No. 77-795

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOHN C. WEGNER AND CHARLES W. WEGNER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1977. A petition for rehearing was denied on November 3, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on December 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' Fifth and Sixth Amendment rights were violated by the government's failure to grant immunity to a defense witness who invoked his privilege against compulsory self-incrimination.

2. Whether the prosecutors' remarks during closing argument denied petitioners a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of manufacturing and possessing liquid amphetamine, in violation of 21 U.S.C. 841(a)(1), and conspiring to commit that offense, in violation of 21 U.S.C. 846. Petitioner John C. Wegner was sentenced to four years' imprisonment on the conspiracy count, to be followed by three years' imprisonment on the substantive charge. Petitioner Charles W. Wegner was sentenced to concurrent terms of one year's imprisonment on both counts. The court of appeals affirmed (Pet. App. A).

The evidence showed that between February and June of 1975 petitioners and co-defendant Robert Strauss, Jr., purchased a variety of chemicals from companies in the Chicago area, often using fictitious names to make the purchases (Tr. 167–206). Among the chemicals purchased was phenylacetone, an essential ingredient for the manufacture of amphetamine (Tr. 299–304, 323).

A search of petitioners' home resulted in the discovery of a clandestine chemical laboratory for the manufacture of amphetamine (Tr. 232, 376, 392).

After his arrest, petitioner John C. Wegner admitted that he had been producing amphetamine in the home laboratory (Tr. 241).

At trial, the defense sought to call one Kurt Johnson, who had been seen with petitioner John Wegner and co-defendant Strauss early in the course of the investigation (Tr. 185). Although both the government and Johnson's attorney represented that Johnson had provided no information to the government regarding the case (Tr. 510–511; Pet. App. 3), petitioners stated that their theory of the case was that Johnson was an informant and that he had been responsible for their indictment (Pet. 4). Prior to trial, Johnson informed the government that he would assert his Fifth Amendment privilege if called to testify (Tr. 510–511). After petitioners subpoenaed him, Johnson testified outside the jury's presence and stated that on advice of counsel he would invoke his privilege against compulsory self-incrimination (Pet. App. 5). Petitioners sought to have the prosecutors immunize Johnson, but they declined to do so. When petitioners called Johnson before the jury, he gave his name but refused to answer any other questions (Tr. 572).

ARGUMENT

1. Petitioners argue (Pet. 7–10) that the trial court should have compelled the government to grant Johnson immunity so that he could testify as a defense witness. Although they assert that his testimony was "critical" (Pet. 10), petitioners have not indicated how that testimony might have helped them. Since the case against petitioners was based on the dis-

covery of a drug laboratory in their home, it is difficult to imagine how they could have benefited from Johnson's testimony even if he had been immunized and even if he was, as they contended, a government informer.

In any event, the decision to request immunity for a witness under 18 U.S.C. 6003(b) rests with the United States Attorney. As the courts have uniformly ruled, the government cannot be compelled to grant immunity to prospective defense witnesses, and the refusal to immunize persons still under criminal investigation does not violate the defendant's Fifth or Sixth Amendment rights. See, *e.g., United States* v. *Alessio,* 528 F. 2d 1079, 1081 (C.A. 9), certiorari denied, 421 U.S. 999; *Earl* v. *United States,* 361 F. 2d *gage Corp.,* 507 F. 2d 492, 494–95 (C.A. 7), certiorari denied, 421 U.S. 999: *Earl* v. *United States,* 361 F. 2d 531 (C.A.D.C.), certiorari denied, 388 U.S. 921. A contrary result is certainly not warranted here, where petitioners have made no showing that Johnson's testimony would have been significantly helpful to their defense.

Petitioners make the related contention that the trial court should have overruled Johnson's claim of privilege because his testimony "could have been given without fear of incrimination" (Pet. 10). As the court of appeals observed (Pet. App. 4), petitioners' premise is simply mistaken. Although Johnson had not been indicted at the time of trial, he was nonetheless under continuing investigation with regard to his part in the drug manufacturing operation

(Tr. 324–325) and therefore faced a very real risk of self-incrimination if he testified.

2. Petitioners further contend (Pet. 11–15) that certain remarks made during the prosecutor's final arguments denied them a fair trial. They point specifically to two statements (Tr. 663, 666):

> [PROSECUTOR]. * * * This is, again, evidence of their intent, I believe. I ask you again and again, look to how they did things. They are not the innocent participants. I think that it tells you a lot about their intent.
>
> [DEFENSE COUNSEL]. Your Honor, I object to what counsel "thinks" or what counsel "believes."
>
> The COURT. Well, you can direct that to the jury, and counsel's personal beliefs are not material.
>
> [PROSECUTOR]. I strike anything with regard to my personal beliefs, your Honor, and I only submit that the evidence shows certain intent. I apologize.
>
> The COURT. Yes. Well, you are entitled to argue that.
>
> * * * * *
>
> [PROSECUTOR]. Rhonda Johnson admitted she used an amphetamine, and she said once was enough, she was nervous already. She was lucky, I believe.

While the interjection of the prosecutor's personal beliefs or his personal evaluation of the evidence is ordinarily improper, *United States* v. *Grooms,* 454 F. 2d 1308, 1312 (C.A. 7), certiorari denied, 409 U.S. 858, the comments complained of here were simply idiomatic and did not to any significant degree invite the jury to focus on the prosecutor's personal assess-

ment of the evidence rather than on the evidence itself. In any event, any impropriety in counsel's remarks was quickly cured by the judge's immediate instruction that counsel's beliefs are not material and by the prosecutor's apology and withdrawal of his remarks.

Petitioners further assert that various comments made during rebuttal were also improper. As the court of appeals noted, however, these remarks were made in response to "vituperative allegations of Government impropriety" (Pet. App. 7) and were thus invited by petitioners' argument. Petitioners' counsel had argued that Kurt Johnson was a government "infiltrator" or "set up man" who had induced petitioners to engage in illegal conduct and who was primarily responsible for the scheme (Pet. App. 7). In response, the prosecutor stated that Johnson was not an informant and that he might yet be indicted (Tr. 684). Upon objection, the trial court instructed the jury to disregard that statement (Tr. 685). In response to the suggestion that the government had "set up" the drug laboratory and "let the prime mover walk away" (Pet. App. 7), the prosecutor noted that petitioners had been indicted by a grand jury (Tr. 683). As the court of appeals held (Pet. App. 8), while the references to the grand jury were improper, they were not sufficiently prejudicial to warrant reversal, particularly since they were made as part of an effort to correct a suggestion of gross governmental misconduct. *Lawn* v. *United States,* 355 U.S. 339, 359–360 n. 15; *United States* v. *Polizzi,* 500 F. 2d

856, 889–890 (C.A. 9), certiorari denied, 419 U.S. 1120; *United States* v. *Isaacs,* 493 F. 2d 1124, 1165 (C.A. 7), certiorari denied, 417 U.S. 976. In any event, in light of the "overwhelming evidence of [petitioners'] guilt" (Pet. App. 8), the court of appeals correctly held that any error stemming from indiscretions on the part of the prosecution was harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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